European Court of Human Rights (Grand Chamber) : Hurbain v. Belgium

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On 4 July 2023 the Grand Chamber of the European Court of Human Rights (ECtHR) confirmed the conclusion of its Chamber judgment of 22 June 2021 in the case of *Hurbain v. Belgium* (IRIS 2021-8/27). The ECtHR found that a court order to anonymise an article in a newspaper's electronic archive did not violate the publisher's right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR). The judgment holds an application of the "right to be forgotten" as part of the right of privacy under Article 8 ECHR, in particular in respect of online media archives (see also IRIS 2013-9/1 and IRIS 2018-8/1). In essence the judgment confirms that the right to be forgotten in certain circumstances can prevail over the integrity of online news archives and the right to freedom of expression and information. As this is the first time that the ECtHR upholds a measure of altering information published lawfully for journalistic purposes and archived on a website of a news outlet, IRIS publishes an extended summary of this Grand Chamber's judgment.

The facts of the case, the domestic proceedings and the chamber judgment

The applicant in this case is the publisher of the Belgian daily newspaper *Le Soir*. He was ordered by a civil judgment in 2013 to render anonymous the digital version of an article published in the newspaper in 1994, and added to the online archive in 2008, in order to respect an individual's claim on the right to be forgotten. The original article mentioned the full name of the individual, Doctor G., who had caused a fatal road-traffic accident. The court order to anonymise the online article was confirmed by the court of appeal in 2014 and upheld by the Supreme Court (Cour de Cassation) in 2016. *Le Soir's* publisher, Mr Hurbain lodged an application with the ECtHR complaining that the order for anonymisation was a breach of Article 10 ECHR. The Belgian government defended the decision of the domestic courts, while Doctor G. intervened in the proceedings before the Strasbourg Court, claiming protection under Article 8 ECHR and his right to be forgotten.

The Chamber judgment of 22 June 2021 found no violation of Article 10 ECHR (IRIS 2021-8/27). The ECtHR confirmed that the most effective way to ensure respect for Doctor G's private life, without disproportionately affecting the

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newspaper's freedom of expression, was to anonymise the article on the newspaper's website by replacing the individual's full name with the letter X. A dissenting opinion of judge Pavli argued that the Court's judgment went against an emerging but clear European consensus that the right to be forgotten claims in the online realm can, and should, be effectively addressed through de-indexation of search engine results, and not by altering the content of online news archives.

On request of Mr. Hurbain, the case was referred to the Grand Chamber in application of Article 43 ECHR. The freedom of expression NGO Article 19, together with 15 other organisations and entities as third-party intervenes (TPI) submitted a joint opinion before the ECtHR. They argued that while there was a balance to be struck between the rights at stake, the permanent removal of information from a digital media archive was not a proportionate restriction on freedom of expression and would have a deleterious impact on the integrity of that archive, which was an essential component of newsgathering and reporting.

The Grand Chamber's approach on the principles

The Court's finding starts with the observation that this case is solely about the continued availability of the information on the Internet, rather than its original publication *per se* and that the original article was published in a lawful and non-defamatory manner. The judgment in its preliminary observations also emphasises that it concerns a news report that was published and subsequently archived on the website of a news outlet for the purposes of journalism, a matter which goes to the heart of freedom of expression as protected by Article 10 ECHR. The ECtHR also reiterates its basic principle that the press does not only have the task of imparting information and ideas, but that the public also has a right to receive them, if not the press would be unable to play its vital role of public watchdog. Therefore particularly strong reasons must be provided for any measure limiting access to information which the public has the right to receive. Furthermore, Internet archives make a substantial contribution to preserving and making available news and information and digital archives constitute an important source for education and historical research. The importance of online news archives is stressed and their role in enabling the public to learn about contemporary history and allowing the press, by the same means, to carry out its task of helping to shape democratic opinion. And since the role of archives is to ensure the continued availability of information that was published lawfully at a certain point in time, online archives must, as a general rule, remain authentic, reliable and complete. Accordingly, the integrity of digital press archives should be the guiding principle underlying the examination of any request for the removal or alteration of all or part of an archived article which contributes to the preservation of memory, especially if, as in the present case, the lawfulness of the article has never been called into question.

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On the other hand, the ECtHR refers to the development of technology and communication tools and the growing number of cases in which persons have sought to protect their interests under what is known as the "right to be forgotten", as part of their right to privacy and protection of their reputation as guaranteed by Article 8 ECHR. An individual can indeed have a legitimate interest in obtaining the erasure or alteration of, or the limitation of access to, past information that affects the way in which he or she is currently perceived, in a variety of contexts such as, for instance, job-seeking and business relations. It is clear that personal information that is published and has been available on the Internet for some time may have a far-reaching negative impact on how the person concerned is perceived by public opinion, while there is also a risk of other harmful effects. As a concrete example the Court refers to its findings in *Biancardi v. Italy* (IRIS 2022-1/15) in which it found that not only Internet search engine providers, but also the administrators of newspaper or journalistic archives accessible through the Internet, could be required to de-index documents, applying a right to be forgotten. It however also clarifies that a claim of entitlement to be forgotten does not amount to a self-standing right protected by the ECHR and, to the extent that it is covered by Article 8, can concern only certain situations and items of information. Furthermore, in order for Article 8 ECHR to come into play, an attack on a person's reputation must attain a certain level of seriousness. The Court emphasises that in any event it has not hitherto upheld any measure removing or altering information published lawfully for journalistic purposes and archived on the website of a news outlet.

The ECtHR further explains that the term "delisting" refers to measures taken by search engine operators, and the term "de-indexing" denotes measures put in place by the news publisher responsible for the website on which the article in question is archived. The measures taken against online content can include removal, alteration or anonymisation or limitations on the accessibility of the information. Furthermore, data subjects are not obliged to contact the original website, either beforehand or simultaneously, in order to exercise their rights *vis-à-vis* search engines, as these are two different forms of processing, each with its own grounds of legitimacy and with different impacts on the individual's rights and interests. Likewise, the examination of an action against a publisher of a news website cannot be made contingent on a prior request for delisting.

The Grand Chamber also refers to its general approach according to which the ECHR is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the ECtHR to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement.

The Grand Chamber's criteria and findings Next, the ECtHR's task is to determine whether the anonymisation order against the article in the news

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archive of *Le Soir* was based on relevant and sufficient reasons in the specific circumstances of the present case and, in particular, whether it was proportionate to the legitimate aim pursued. To make this assessment and in particular considering the need to preserve the integrity of press archives, the ECtHR takes into account the following criteria: (i) the nature of the archived information; (ii) the time that has elapsed since the events and since the initial and online publication; (iii) the contemporary interest of the information; (iv) whether the person claiming entitlement to be forgotten is well known and his or her conduct since the events; (v) the negative repercussions of the continued availability of the information online; (vi) the degree of accessibility of the information in the digital archives; and (vii) the impact of the measure on freedom of expression and more specifically on freedom of the press.

Before applying these criteria the ECtHR expresses its awareness of the possible chilling effect on freedom of the press stemming from the obligation for a publisher to anonymise an article that was initially published in a lawful manner, as such an obligation entails a risk that the press may refrain in the future from keeping reports in its online archives, or that it will omit individualised elements in articles that are likely to be the subject of such a request. The ECtHR, nevertheless, also emphasises that the content providers are required to assess and weigh up the interests in terms of freedom of expression and respect for private life only where the person concerned makes an express request to that effect.

After applying and assessing each of the seven criteria it has put forward, the Grand Chamber of the Court reaches the conclusion that the Belgian courts took account in a coherent manner of the nature and seriousness of the judicial facts reported on in the article in question, the fact that the article had no topical, historical or scientific interest, and the fact that Doctor G. was not well known. In addition, the Belgian courts attached importance to the serious harm suffered by Doctor G. as a result of the continued online availability of the article with unrestricted access, which was apt to create a “virtual criminal record”, especially in view of the length of time that had elapsed since the original publication of the article. Furthermore, after reviewing the measures that might be considered, in order to balance the rights at stake, the Belgian courts held that the anonymisation of the article did not impose an excessive and impracticable burden on the applicant, while constituting the most effective means of protecting Doctor G.’s privacy. Therefore the ECtHR reaches the final conclusion that the interference with the right guaranteed by Article 10 ECHR, on account of the anonymisation of the electronic version of the article on the website of the newspaper *Le Soir*, was limited to what was strictly necessary and can thus, in the circumstances of the case, be regarded as necessary in a democratic society and proportionate. It therefore sees no strong reasons to substitute its own view for that of the domestic courts and to disregard the outcome of the balancing

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exercise carried out by them. Accordingly, there has been no violation of Article 10 ECHR.

The Grand Chamber however reached no unanimity for this finding: 5 of 17 judges argue in a dissenting opinion why the harm invoked by the person named in the litigious lawful article was not serious enough to justify the alteration of the online version of the newspaper article. The dissenters express in particular that the alteration of the online version was disproportionate, as the delisting of the article from the results of search engines was to be considered a less restrictive interference with the right to freedom of expression and information as guaranteed by Article 10 ECHR. The dissenters also invoked the juxtaposition between ‘the right to be forgotten’ and ‘the right to remember’.

Judgment by the European Court of Human Rights, Grand Chamber, in the case of Hurbain v. Belgium, Application no. 57292/16, 4 July 2023

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